89-1182

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

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COMMONWEALTH OF KENTUCKY — PETITIONER

versus

CHARLES DAVID JOHNSON — RESPONDENT

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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26 pp

## QUESTION PRESENTED

I.

DOES FOURTH AMENDMENT PERMIT POLICE OFFICERS WHO HAVE MADE "TERRY" STOP TO FOLLOW INDIVIDUAL INTO MOTEL ROOM WHEN INDIVIDUAL HAS INDICATED INTENT TO REJOIN OFFICERS MOMENTARILY AND OFFICERS HAVE REASON, BASED UPON SPECIFIC AND ARTICULABLE FACTS, TO BELIEVE INDIVIDUAL IS POTENTIALLY DANGEROUS AND MAY GAIN ACCESS TO WEAPONS WHILE IN ROOM?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED..... | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iii-iv |
| OPINION BELOW..... | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED.. | 2 |
| STATEMENT OF THE CASE..... | 2-10 |
| MANNER IN WHICH FEDERAL QUESTION WAS RAISED..... | 10-13 |
| REASONS FOR GRANTING CERTIORARI..... | 14-21 |
| CONCLUSION..... | 21 |
| APPENDIX..... | Volume II |

## TABLE OF AUTHORITIES


PAGE

CASES

Adams v. Williams,
406 U.S. 143, 92 S.Ct. 1921,
32 L.Ed.2d 616 (1972)..... 17

Amador-Gonzalez v. United States,
391 F.2d 308 (5th Cir. 1968)..... 14

Commonwealth v. Daniels,
218 Pa.Super. 278, 421 A.2d 721 (1980) 19

Commonwealth v. Johnson,
777 S.W.2d 876 (Ky. 1989)..... 12

Edwards v. United States,
364 A.2d 1209 (1977)..... 20

Michigan v. Long,
463 U.S. 1032, 103 S.Ct. 3469,
77 L.Ed.2d 1201 (1983)..... passim.

Servis v. Commonwealth,
371 S.E.2d 156 (1988)..... 19

State v. Davis,
295 Or. 227, 666 P.2d 802 (1983)... 19

State v. Mayfield,
10 Kan.App.2d 175,
694 P.2d 915 (1985)..... 18

Stephens v. Commonwealth,
552 S.W.2d 181, 183 (Ky.1975)..... 13

Terry v. Ohio,
392 U.S. 1, 88 S.Ct. 1868,
20 L.Ed.2d 889 (1968)..... passim.

United States v. Causey,
834 F.2d 1179 (1987)..... 15

United States v. Johnson,
637 F.2d 532, 535, (8th Cir. 1980)... 20

United States v. McClinnhan,
660 F.2d 500, 504 (D.C. Cir. 1982)... 20

United States v. Smith,
802 F.2d 1119, 1124 (1986)..... 15

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States
Constitution..... passim.

Fourteenth Amendment, United States
Constitition..... 11

The Attorney General of Kentucky respectfully petitions this Court for a writ of Certiorari to review the judgment of the Kentucky Supreme Court.

## OPINION BELOW

The opinion of the Kentucky Supreme Court is reported as Commonwealth v. Johnson, 777 S.W.2d 876 (Ky. 1989). The opinion of the Kentucky Court of Appeals is copied in the appendix to this petition. Johnson v. Commonwealth, 86-CA-748-MR and 86-CA-1305-MR, Slip Op. (2/19/88).

## JURISDICTION

The opinion below by the Kentucky Supreme Court was originally issued on June 8, 1989, and became final on November 9, 1989, when the Kentucky Supreme Court entered an order denying the Commonwealth's timely petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [n]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On September 14, 1985, Charles David Johnson was arrested by Erlanger, Kentucky, police officers for possession of drug paraphernalia and cocaine. (Transcript of Proceedings, hereinafter "TP", Commonwealth of Kentucky v. Johnson, Indictment No. 85-CR-195, 11/21/85, p. 25). A search of Johnson's motel room at the Penny Pincher Motel following his arrest revealed, in addition to the drugs and drug paraphernalia, a handgun underneath the bed; a

shotgun; and two (2) ball bats. (TP 11/21/85, p. 16; affidavit in support of search warrant for room 329, Ramada Inn, signed September 17, 1985, at 9:55 p.m.).

Johnson was subsequently released from custody. On September 17, 1985, Chief Gene Weaver of the Ft. Wright, Kentucky, Police Department was notified that an off-duty officer had observed Johnson acting "in a peculiar manner" at the Ft. Wright Ramada Inn. (TP 11/18/85; 3). Ft. Wright is located approximately five (5) miles from the Erlanger area. (Id, 16). Johnson was observed moving clothes and objects back and forth from the interior to the trunk of his car. "He would stand up, look around the parking lot, go back to doing it, look around again, move to the interior of the vehicle, come back to the trunk again carrying objects." (Transcript of Evidence, hereinafter "TE" 11/26/85; 203).

After confirming that Charles David Johnson was in fact staying at the motel, an officer was

dispatched to the scene along with a dog trained in drug detection. The dog reacted in a manner which indicated he had detected the scent of a controlled substance upon being walked around Johnson's car. (TP 11/18/85, 3-4). A search warrant was obtained for the car. Police officers then went to Johnson's motel room to inform him that a search warrant had been issued for the car, as well as to give him an opportunity to accompany the officers on the search and to provide them with the keys to the car so that breaking the locks would not be necessary. (Id., 4-6).[1]

---

[1]Although the Kentucky Court of Appeals opinion in this case states that "the Cadillac had been unlocked all this time", this conclusion was apparently reached through a misinterpretation of Chief Weaver's testimony that "[w]e went to the car. He had the keys in his pocket. The car was unlocked and the search of the car was conducted." (TP 11/18/85, 12). Chief Weaver had earlier testified that the motel room "door was unlocked" after the passkey was obtained. (TP 11/18/85, 8).

When the police officers arrived at Johnson's motel room at approximately 8:30 p.m. (affidavit in support of search warrant for room 329, Ramada Inn), they found the door standing partially open. They knocked on the door. A voice from within called out, "who is it?", and they identified themselves as police officers. Johnson came to the door, opened it some more to look out and, when he saw the police officers, started to close the door. The officers kept him from closing the door, and asked him to open the door back up and step out into the hallway. Johnson stepped out into the hallway and closed the door behind him. (TP 11/18/85, 6-7).

Johnson indicated that he wanted to accompany the officers on the search, but also that he wanted to put on some additional clothes first. He was at that time dressed only in underclothing and a pair of boots. (Id., 7). Since the door had locked when Johnson closed it behind him, a passkey was obtained to unlock the

door. Johnson attempted to slam the door behind him as he entered the motel room. An officer prevented him from doing so, and two or three officers stepped into the room at that point. Once inside the room, drugs and drug paraphernalia similar to that seized at the Penny Pincher Motel were observed in plain view. The items were located on the "sink area" next to the door. (TP 11/18/85, 10, 14). Johnson put his pants on and went with the officers to the parking lot to observe the search of his car. (TP 11/18/85, 11). Another search warrant was obtained, and the items observed in the motel room were seized. No contraband was found during the search of the automobile. (TP 11/18/85, 12-13).

At the suppression hearing, Chief Weaver testified that before entering the Ramada Inn room "I had information that three or four days prior to this search that a search in Erlanger had revealed weapons there. Also through

conversations of friends and acquaintances of Mr. Johnson's that he was known to carry firearms. Through an arrest in Carbondale, Illinois, that a gun was involved in that arrest also. As well as his prior record of gun involvement and weapons involvement." (TP 11/18/85, 15). Chief Weaver testified that Johnson was not under arrest, but had indicated that he wanted to accompany police officers on the search of the automobile and had to put on some more clothes first. Chief Weaver testified that "we restrained him from closing the door for our own personal safety as well as his." (Id., 7, 9).

Johnson was tried on charges of trafficking in cocaine and possession of drug paraphernalia. He was convicted of possession of drug paraphernalia and possession of cocaine. Johnson was also convicted of persistent felony offender in the first-degree and sentenced to two (2) concurrent fifteen (15)

year terms of imprisonment on the cocaine charges and two (2) concurrent misdemeanor sentences on the drug paraphernalia charges.

A charge of possession of a handgun by a convicted felon was severed from the drug charges and tried separately. Johnson was convicted of the handgun offense, also, and sentenced to a term of imprisonment of fifteen (15) months to be served consecutively to his other sentences.

In an opinion rendered by the Kentucky Court of Appeals on February 19, 1988, the judgment of the Kenton Circuit Court in both cases was reversed based upon the denial of Johnson's motion to suppress the evidence seized by police at the two motel rooms. Charles David Johnson v. Commonwealth, 86-CA-748-MR and 86-CA-1305-MR. At page 9 of the slip opinion of the Kentucky Court of Appeals, the court concluded that "the forced, warrantless entry into Johnson's Ramada Inn room constituted a

search and seizure within the meaning of the Fourth Amendment." At page 10, the Kentucky Court of Appeals stated "the police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and, upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)."

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review by order entered May 31, 1988. The Kentucky Supreme Court also permitted Johnson to cross appeal on two issues which were raised but not decided by the Kentucky Court of Appeals in its opinion.

On June 8, 1988, the Kentucky Supreme Court rendered an opinion affirming in part and reversing in part the decision of the Kentucky Court of Appeals; and affirming the issues on cross appeal. Commonwealth v. Johnson, 777 S.W.2d 876 (Ky. 1989). The Kentucky Supreme

Court reversed the decision of the Kentucky Court of Appeals with respect to an issue raised concerning the search of Johnson's motel room at the Penny Pincher Motel in Erlanger; the ruling of the Kentucky Court of Appeals on the issue of the entry of police officers into Johnson's Ramada Inn room in Ft. Wright three days later was affirmed by an equally divided court.

Petitions for Rehearing filed by both parties in the Kentucky Supreme Court were denied on November 9, 1989.

Manner In Which Federal Question Was Raised

In the motion to suppress filed by Johnson in the trial court on November 15, 1985, concerning the seizure of drugs and related items at the Ramada Inn, it was argued that both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution had been violated when police officers entered Johnson's room. (TR 31-39). Based upon the unrefuted testimony of Chief

Weaver at the suppression hearing, the motion was overruled. (TP 11/18/85; TR 41).

Upon appeal to the Kentucky Court of Appeals, Johnson argued that the trial court "erred by failing to suppress the evidence which resulted from this search since it was obtained by an illegal search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution. More specifically, the police entered [Johnson's] motel room illegally and the items recovered were the fruit of this illegal entry." Brief for Appellant, Johnson v. Commonwealth, 86-CA-748-MR, p. 3.

Writing for a unanimous three-judge panel of the Kentucky Court of Appeals, Judge Dan Jack Combs agreed that the evidence was obtained in violation of Johnson's "rights under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution." Johnson v. Commonwealth, Kentucky Court of Appeals No. 86-CA-195, Slip Op. at 5 (2/19/88).

The Commonwealth of Kentucky sought and obtained discretionary review from the Kentucky Supreme Court, citing cases including Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) in its brief to argue that the lower court's interpretation of the Fourth Amendment in this case was erroneous. By the time the case was set for oral argument, Judge Combs of the Kentucky Court of Appeals had been elected to serve on the Kentucky Supreme Court. Since he wrote the Kentucky Court of Appeals' opinion in the Johnson case, he did not participate in the decision of the Kentucky Supreme Court.

The opinion of the Kentucky Court of Appeals was affirmed on the Ramada Inn entry issue as the result of a 3-3 split by the Kentucky Supreme Court. Commonwealth v. Johnson, 777 S.W.2d 876 (Ky.1989). Three justices believed the entry was a violation of Section 10 of the Constitution of Kentucky, and expressed no view

on the application of the Fourth Amendment to the Federal Constitution. The remaining three justices declared "a proper interpretation of Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police" and characterized the police entry at the Ramada Inn as "perfectly reasonable" to assure that Johnson did not emerge with gun in hand. Johnson, 777 S.W.2d at 882.

In its petition for rehearing, the Commonwealth pointed out that Section 10 of the Kentucky Constitution and the Fourth Amendment to the Constitution of the United States had been construed as being "practically the same" in a previous case, Stephens v. Commonwealth, 552 S.W.2d 181, 183 (Ky.1975).

The state petition for rehearing was denied without comment.

## REASONS FOR GRANTING CERTIORARI

### I.

### GUIDANCE IS NEEDED FROM THIS COURT ON THE CORRECT APPLICATION OF THE PRINCIPLES OF TERRY V. OHIO AND MICHIGAN V. LONG WHERE THE CHALLENGED POLICE CONDUCT INCLUDES ENTRY INTO A DWELLING.

Three Justices of the Kentucky Supreme Court disapproved of police entry into Johnson's motel room in this case, comparing the situation to a warrantless search on the basis of a pretextual arrest. The Court cited the case of Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), and wrote that "a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement." Commonwealth v. Johnson, 777 S.W.2d at 880.

The Fifth Circuit Court of Appeals in Amador-Gonzalez based its 1968 decision upon a subjective test which invalidated the search

because the officer involved admitted at the suppression hearing that he was looking for drugs when he arrested the defendant for a minor traffic violation. 391 F.2d at 313. Therefore, the court reasoned, "the arrest, no matter how lawful in itself, cannot support the search." 391 F.2d at 314.

The Commonwealth pointed out in its state court petition for rehearing that the Fifth Circuit Court of Appeals overruled Amador-Gonzalez in 1987. In the case of United States v. Causey, 834 F.2d 1179 (1987), the Fifth Circuit Court of Appeals discussed several cases from the United States Supreme Court in concluding that so long as police do no more than they are objectively authorized and legally permitted to do, their motives are irrelevant and hence not subject to inquiry. 834 F.2d at 1184. The Ninth Circuit Court of Appeals, however, still uses a subjective test. United States v. Smith, 802 F.2d 1119, 1124 (1986).

Either way, with respect to Charles David Johnson the entry was proper because Chief Gene Weaver expressly denied that they entered Johnson's room for the purpose of gaining evidence against him. (TP 11/18/85, 14). Such testimony is especially credible because, at the time of the entry, the police officers had every reason to believe that at least some quantity of a controlled substance was located in Johnson's automobile. The police officers already had a search warrant for the automobile, and could anticipate having probable cause to arrest Johnson following the automobile seach.

The assertion in the Kentucky Court of Appeals' opinion that "the police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and, upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)" is an alarming interpretation of Terry.

It also ignores the interpretation of Terry in later cases by this Court including Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972). In Long, at 463 U.S. 1047, it was pointed out that Terry need not be read as a restricting a preventative search to the person of the detained suspect. Both Long and Williams indicate that police officers may take reasonable action to insure their safety. Police officers should not be required to give suspects repeated opportunities to gain access to weapons especially where, as here, the suspect has consented to continuing contact with police officers (Johnson was not under arrest and could have refused to accompany police to the parking lot if he wished, TP 11/18/85, 8); he is known to have had a gun (under his bed) only three (3) days earlier; and he has indicated his intent to rejoin the officers.

A number of variations on this issue have appeared in state and federal courts in the past few years, and will undoubtedly arise in the future. In State v. Mayfield, 10 Kan.App.2d 175, 694 P.2d 915 (1985), police were called to an apartment building to investigate a report of an individual knocking on the caller's door for twenty (20) minutes. Police officers who responded to the call found the defendant standing in the hallway near the caller's door. After being asked to produce identification, the defendant became belligerent and argued with police, but finally agreed to get some identification from his apartment. The police officers followed Mayfield into his apartment, and once inside observed a "hash" pipe in plain view. The Kansas Court determined that the officers acted properly, and since the defendant at no time refused to furnish identification or break off the interview the continuation of the confrontation or custodial relationship between

the defendant and the officers was at least with the tacit consent of the defendant. Mayfield, 694 P.2d at 918. The Kansas Court concluded that "clearly the officer would have been without good sense . . . not to stick to [Mayfield] pretty closely just for his own safety." (Id.) See also, Commonwealth v. Daniels, 218 Pa.Super. 278, 421 A.2d 721 (1980).

Virginia's Court of Appeals has applied the Terry and Long cases to uphold the actions of police officers who entered a suspect's motel room while monitoring his movements following a Terry stop. Servis v. Commonwealth, 371 S.E.2d 156 (1988). The Servis court notes the case of State v. Davis, 295 Or. 227, 666 P.2d 802 (1983), as reaching a contrary result in a similar situation.

Recent cases by United States Courts of Appeal have approved of a "protective" search

and seizure in some circumstances, United States v. Johnson, 637 F.2d 532, 535, (8th Cir. 1980); and have concluded that certain containers such as briefcases may be searched by police pursuant to a Terry stop in order to prevent "a dangerous scuffle for access to the weapon." United States v. McClinnhan, 660 F.2d 500, 504 (D.C. Cir. 1982). The District of Columbia Court of Appeals upheld the actions of a police officer in following an individual from the street into an apartment in order to make a "Terry" stop. Edwards v. United States, 364 A.2d 1209 (1977).

The decision of the Kentucky courts aside from being erroneous, penalizes police officers for taking reasonable steps to insure their safety. Rather than deterring unlawful police conduct, it only penalizes appropriate and lawful decisions made under circumstances which severely limit the opportunities for reflection and consideration of alternatives. A decision from this Court is needed not only to correct

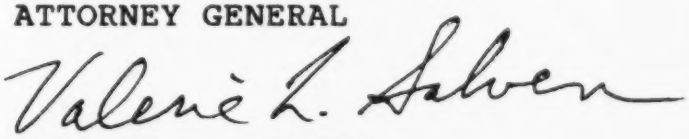
the error in this case, but to resolve the conflicting interpretations of Terry rendered by various state and federal courts in other, similar, cases involving police entry into a dwelling.

## CONCLUSION

Wherefore, the Commonwealth of Kentucky respectfully petitions this Court for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL



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89-1182

No. _____



IN THE
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October Term, 1989

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COMMONWEALTH OF KENTUCKY — PETITIONER

versus

CHARLES DAVID JOHNSON — RESPONDENT

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# VOLUME II -- APPENDIX
# PETITION FOR WRIT OF CERTIORARI
# TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF KENTUCKY

Nos. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v. ON APPEAL FROM THE COURT OF APPEALS

CHARLES DAVID JOHNSON — APPELLEE

AND

CHARLES DAVID JOHNSON — CROSS-APPELLANT

vs. ON CROSS-APPEAL FROM THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY — CROSS-APPELLEE

ORDER DENYING PETITIONS FOR REHEARING

The petitions for rehearing of this court's opinion rendered June 8, 1989, filed by the appellan Commonwealth of Kentucky and by the cross-appellant Charles David Johnson are denied.

All concur.

Entered: November 9, 1989

/s/ Robert F. Stephens
Chief Justice

Rendered: June 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v. ON APPEAL FROM THE COURT OF APPEALS

CHARLES DAVID JOHNSON — APPELLEE

AND

CHARLES DAVID JOHNSON — CROSS-APPELLANT

vs. ON CROSS-APPEAL FROM THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY — CROSS-APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART AND REVERSING IN PART ON APPEAL

AFFIRMING ON CROSS APPEAL

The primary issue in this case is whether certain evidence used against appellant was lawfully obtained. On two separate occasions,

three days apart, appellant was found to be in possession of illegal drugs, drug paraphernalia, and in the first instance, a handgun. The trial court overruled both of appellant's motions to suppress the evidence, but the Court of Appeals reversed holding that the police officer's act of shining a flashlight into a darkened hotel room, and their act of forcing their way into another hotel room, violated Section 10 of the Kentucky Constitution and the Fourth Amendment to the Constitution of the United States. We granted the Commonwealth's motion for discretionary review to consider the issues it presented. We likewise granted appellant's cross-motion for discretionary review to consider his claims of trial error.

## I. Evidence Obtained at the Penny Pincher Motel

At approximately 6:00 a.m. on September 14, 1985, the Erlanger Police were summoned to the motel in response to a complaint from a guest of a disturbance. The guest had reported that someone was beating on his door with a baseball

bat. Upon the officer's arrival, appellant was found standing in an outside hallway between two motel rooms. One of the police officers knew appellant to be a drug user and perceived him to be under the influence of drugs at that time. During questioning, the police learned that appellant's room was number 165 and observed that the door was slightly ajar. While one officer talked with the appellant and asked for his identification, the other shined a flashlight through the partially open door into the darkened room. Just inside the door on a table top, the officer observed drug paraphernalia and a white powder substance. After this discovery, the officer noticed an opening in the window curtain. As he had done before and without entering the room, he shined his flashlight through the window and observed a handgun under the bed. Appellant was arrested, the police obtained a search warrant, and upon their search, cocaine, drug paraphernalia, and a

handgun were found. Subsequently, appellant was convicted of various drug possession offenses and possession of a handgun by a convicted felon.

Prior to trial, appellant moved the court to suppress the evidence. His motion was denied. On appeal, however, the Court of Appeals reversed. It held that the act of shining a flashlight beam into a darkened room amounted to a warrantless search in violation of appellant's constitutional rights.

At the outset we must determine whether the act complained of constitutes a search within contemplation of the Fourth Amendment and Section 10 of the Constitution of Kentucky. From the facts presented the police were entirely within their rights to go upon the motel premises and to the location where appellant was encountered. A disturbance had been reported to them and their assistance had been requested by the management of the motel. Upon seeing appellant in the hallway at or near

the location of the reported disturbance and upon discerning that he appeared to be under the influence of drugs, their attention was naturally drawn to him, and by virtue of his whereabouts, to his room.

By design, rooms in modern motels are easily accessible and in close proximity to places of public passage. Many such rooms have picture windows with only a curtain to prevent public view. Without diminishing an individual's right to be protected from an unreasonable search of his motel room, Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), we note that when one takes lodging in a motel it is with the certain knowledge that substantial numbers of persons unknown to him will be nearby and in a position to invade his privacy unless caution is exercised to prevent it. As such, what would be sufficient vigilance to preserve one's privacy in a home, apartment or office may be insufficient in a motel room. This view was

recognized in People v. Berutko, Ca., 453 P.2d 721 (1969), as follows:

> Essential to the determination of reasonableness in cases wherein officers obtain probable cause for arrest through their own observation is a consideration of the degree of privacy which a defendant may reasonably expect in a given enclosure accepted by him, whether or not that enclosure be his residence. (Emphasis added.)

In those instances when the police have a legitimate reason for their presence on the motel premises, we are without reluctance in holding that one who asserts that his rights have been violated by an unreasonable search accomplished by looking through a motel room window or door must show that he took precautions sufficient to create an objectively reasonable expectation of privacy. Otherwise, that which was seen was in plain view. Harris v. U.S., 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Having concluded that appellant's act of leaving his motel room door and window partially open to public view deprived him of a reasonable expectation of privacy, of what significance then is the police officer's use of a flashlight to look inside? In Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the Supreme Court broadly declared that ". . . the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." Likewise, in U.S. v. Richardson, 388 F.2d 842 (CA6, 1968), the court held that use of ultra-violet light to determine if the defendant had touched a bank bag dusted with fluorescein powder was not a search within the fourth amendment. This court reached a similar result in Rudolph v Commonwealth, Ky., 474 S.W.2d 376 (1971), but our holding was premised on the officer's legitimate concern for his safety as a reason for his use of a flashlight. We are now

of the opinion that a determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day. One seeking to maintain his privacy should reasonably expect that persons disposed to look inside a motel room will not hesitate to enhance their visibility by use of a widely available device such as a flashlight. In Texas v. Brown, supra, in commenting upon the fact that the officer "bent down at an angle so [he] could see what was inside," the court said:

> The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.

In Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in its plurality opinion the court set forth three requirements for a valid plain view seizure. These requirements are: prior justification for the officer's presence, inadvertence of

discovery, and immediate apparentness that evidence has been found. Observation of these limitations provides sufficient protection for the public as guaranteed by Section 10 of the Constitution of Kentucky and the Fourth Amendment to the Constitution of the United States. On this issue we reverse the Court of Appeals.

## II. Evidence Obtained at The Ramada Inn

On September 17, 1985, three days after appellant's arrest at the Penny Pincher Motel and following his release on bond, an off duty police officer observed appellant in the parking lot of the Ramada Inn. Upon probable cause, the sufficiency of which is not at issue here, the police obtained a warrant to search appellant's automobile.* Prior to commencement of the

*In addition to appellant's automobile, the police sought a warrant to search his motel room. The district judge to whom the affidavit was presented determined that probable cause was not shown for a search of the room and declined to issue the warrant.]

search, the officer went to appellant's motel room to inform him of the warrant and give him an opportunity to accompany them to the car and provide the keys.

Upon arrival at appellant's motel room, and consistent with what appears to be his normal practice, the police discovered the door standing slightly open. The officer knocked on the door and appellant, wearing only undershorts and a pair of boots, stepped out into the hallway. When informed of the search warrant for his car, appellant indicated he would provide a key and that he wanted to accompany the officers to observe the search. Attempting to re-enter his room to dress and obtain his keys, appellant discovered that he had locked himself out. As his attire was unsuitable for public activity and he did not have his keys on his person, one of the police officers offered to obtain a key from the motel office. Upon the

officer's return with the passkey, appellant entered his room and attempted to slam the door behind him. One of the officers prevented the door from closing and the officers then forcibly entered the room. Once inside, the police discovered drugs and drug paraphernalia.

The Commonwealth argues that the police were entitled to force their way into the motel room to protect their personal safety. We are reminded that just three days earlier appellant had been found in possession of a handgun and the Commonwealth reiterates that appellant had stated he wished to accompany the police during the automobile search. On the theory that appellant would enter his room and return with a gun or other weapon, the Commonwealth argues that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), authorized the police to maintain observation of appellant while he was inside his

room. As such observation could only be accomplished by entering the motel room, the Commonwealth argues, the police were within their rights to force their way inside.

We need not burden this opinion with a review of the various exceptions to the warrant requirement of the United States and Kentucky Constitutions. It is sufficient to say that we have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to constantly observe him at a time at which he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is

invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement.

By the views expressed in this opinion, we do not denigrate the legitimacy of police officers' concern for their personal safety. We recognize, however, that preservation of constitutional rights frequently conflicts with an officer's perception of his need to protect himself. This court and other courts have willingly found exceptions to various constitutional provisions to better insure the safety of police officers. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 407, 9 L.Ed.2d 889 (1968); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971); Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971). We are not willing,

however, to recognize exceptions so broad as to render meaningless the right secured by the Constitution of Kentucky.

Without expressing any view as to the result which would be reached in this case by application of the Fourth Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue we affirm the Court of Appeals.

III. Issues on Cross-Appeal

Appellant first contends that te trial court erred to his prejudice by permitting a police officer to testify that when appellant's room was searched, the police wore rubber gloves because they had heard he ". . . might have AIDS or some other disease." In Wiggins v. Maryland, Md.Ct.App. 57 USLW 2539 (March 7, 1989) (No.

94-1988), the court noted that ". . . a climate of fear still surrounds the disease," and held

> it is not far-fetched that the jury, observing the (rubber) gloves, thought it better in any event, that the defendant be withdrawn from public circulation and confined in an institution with others of his ilk.

We agree with the Maryland Court that raising the specter of AIDS, without substantial relevance in bringing this to the attention of the jury, may result in unfair prejudice. In this case, however, the trial court's error in the admission of this evidence was harmless. RCr 9.24. Appellant was convicted of possession of cocaine, possession of drug paraphernalia, and possession of a handgun by a convicted felon. The evidence of his guilt was overwhelming and his substantial rights were not affected.

Finally, appellant's claim that he was prejudiced by evidence that his home had been searched by the police on an earlier occasion is

without merit for two reasons. First, the absence of any carpentry tools at appellant's place of dwelling was relevant to rebut his testimony that he worked as a carpenter. Second, defense counsel raised an issue concerning police surveillance of appellant. The Commonwealth was thus entitled to explain that their surveillance resulted in the issuance of a search warrant. Moreover, the fact that no evidence of criminal activity was found at appellant's residence may have been to his advantage. Certainly, we are unprepared to say that he was prejudiced by this testimony.

## CONCLUSION

For the foregoing reasons and as set forth herein, upon the Commonwealth's appeal, we affirm in part and reverse in part; upon the cross appeal by appellant, we affirm. This cause is remanded to the trial court for further proceedings in conformity herewith.

As to Section I, all concur except Combs, J., not sitting. As to Section II, Lambert, Leibson and Vance, JJ., concur; Wintersheimer, J., dissents by separate opinion in which Stephens, C. J., and Gant, J., join; Combs, J., not sitting. On this issue the Court of Appeals is affirmed by an equally divided Court. As to Section III, all concur except Combs, J., not sitting.

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SUPREME COURT OF KENTUCKY

Nos. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-748-MR
(Kenton Circuit Court #85-CR-195)

CHARLES DAVID JOHNSON — APPELLEE

AND

CHARLES DAVID JOHNSON — CROSS-APPELLANT

ON REVIEW FROM COURT OF APPEALS
vs. 86-CA-1305-MR
(Kenton Circuit Court #85-CR-195)

COMMONWEALTH OF KENTUCKY — CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which affirms the decision of the Court of Appeals in regard to the suppression of evidence obtained from a search of the Ramada Inn hotel room. The trial judge correctly overruled the defendant's motion to

suppress evidence obtained in the search.

I specifically and strongly reject any implication from the majority opinion that this search was a pretext. The determination of whether a search is reasonable under the circumstances is predominantly factual and should stay in the hands of the trial judge. A reviewing court should not substitute its findings for those of the trial judge. The trial judge is in the best position to ascertain the facts. Cf. CR 52.01.

When a reasonably prudent police officer believes that his safety or that of others is in danger, he may make reasonable search for weapons of a person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual. This is true even though the officer is not absolutely certain that the individual is armed, although he must secure a warrant when practical

before making search or arrest. Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971). When such a search of a person that an officer believes is armed is confined to what is minimally necessary to determine whether the party is armed for the purposes of protecting the officer, the search is reasonable. Phillips, supra; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The real dangers with which police officers are confronted in their work on a daily basis cannot be ignored. Here the officers knew that a gun had been found in Johnson's motel room only three days earlier at the Pennypincher in Erlanger. The Fourth Amendment to the United States Constitution does not require a police officer who lacks the precise level of information necessary for probable cause to simply allow a crime to occur or a criminal to escape. Terry, supra, recognizes that an intermediate response may be appropriate and

that a brief stop of a suspicious individual in order to maintain the status quo momentarily while obtaining more information may be reasonable in the light of the facts known to the officers at the time. Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972).

Johnson was not a less dangerous suspect by the mere fact that he was not under arrest when the officers asked him for the keys to his car. Other state courts have found it reasonable to permit police officers to protect themselves while they are still investigating a possible crime. See Commonwealth v. Daniels, 280 Pa. 278, 421 A.2d 721 (1980); State v. Mayfield, 10 Kans.App. 2d 175, 694 P.2d 915 (1985). The reasoning of the Pennsylvania and Kansas courts was sensible and correct and properly persuasive when applied to the actions of the police in this case.

The United States Courts of Appeals have recently indicated that a protective search can be appropriate in certain circumstances. See United States v. Johnson, 637 F.2d 532 (8th Cir. 1989); United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1982).

The United States Supreme Court has recognized that suspects may injure police and others by virtue of their access to weapons even though they may not be armed. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The U.S. Supreme Court determined that an interpretation of Terry, supra, need not restrict the preventative search to the person of the detained subject. If a suspect is dangerous, he is no less dangerous simply because he is not arrested.

The United States Supreme Court has applied a common sense approach to this dangerous and delicate area of constitutional interpretation. A proper interpretation of Section 10 of the

Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police in exercising a protective search. The police entry into Johnson's Ramada Inn room was perfectly reasonable to assure that he did not emerge with gun in hand.

I would reverse the decision of the Court of Appeals and reinstate the judgment of the circuit court.

Stephens, C.J., and Gant, J., join in this dissent.

OPINION RENDERED: February 19, 1988;
10:00 a.m.
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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 86-CA-748-MR

CHARLES DAVID JOHNSON — APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 85-CR-195

CHARLES DAVID JOHNSON — APPELLEE

AND NO. 86-CA-1305-MR

CHARLES DAVID JOHNSON — APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
vs. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 85-CR-195

COMMONWEALTH OF KENTUCKY — APPELLEE

REVERSING

* * * * *

BEFORE: COMBS, LESTER and MILLER, Judges.

COMBS, JUDGE. Charles David Johnson, appeals his conviction in the Kenton Circuit Court of two counts of possession of a controlled substance, two counts of possession of drug paraphernalia, and his additional conviction as a persistent felony offender. Johnson was sentenced to fifteen years' imprisonment and was fined $11,000.00.

Johnson set forth four grounds for reversal. Two of his grounds are that his two motions to suppress evidence were improperly overruled under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. His other two grounds are that his objections to certain testimony adduced by the prosecution during his trial were improperly overruled.

The events leading to Johnson's troubles occurred on two different days in September, 1985, and both took place at or near motel rooms he had rented. A carefully detailed review of these events is necessary.

## I. SEPTEMBER 14, 1985, AT THE PENNY PINCHER MOTEL

A guest in the room next to Johnson's room complained to the motel manager that a man next door was beating on the door with a baseball bat. The manager reported the disturbance to the Erlanger Police Department, and a Sergeant Steffen and Officer Gilbert responded to the call.

The two police approached Johnson who was standing in the hallway between his door and that of the complaining guest. He had no baseball bat and made no attempt to flee. Steffen had prior firsthand knowledge of Johnson, recognized him, and knew him to be a drug user. Steffen perceived that Johnson was under the influence of drugs.

Gilbert asked Johnson for some identification and, while he was questioning Johnson, Steffen noticed that one of the two closest doors was slightly ajar. A "Do Not

Disturb" sign was hanging from the doorknob. Steffen peered through the opening "for his own protection," and "to see if anyone else was in there." The room, Steffen testified, was "totally dark." Steffen shone his flashlight into the room and saw drug paraphernalia and white powder. He also shone his flashlight through the room's window and saw a handgun. Johnson had told them during this time that that room was his. He had not been placed under arrest up to the time Steffen saw the contraband.

Johnson was placed under arrest after Steffen saw the drugs, paraphernalia and handgun. The police entered the room which was otherwise unoccupied. A search warrant was obtained to search the room for the contraband Steffen had just seen. The affidavit made to secure the search warrant did not mention the handgun. Johnson was convicted of possession of cocaine and drug paraphernalia, and possession of a handgun by a convicted felon. He was released from custody subsequent to his arrest.

## II. SEPTEMBER 17, 1985, AT THE RAMADA INN MOTEL

A police officer observed Johnson at the Ramada Inn behaving in a "peculiar manner." He reported this to the Ft. Wright Chief of Police, Gene Weaver. Weaver established that Johnson was registered at the motel.

Arrangements were made for a team from the Airport Police Department's canine unit to go to the scene and perform a "walk around" Johnson's car, a 1985 Cadillac. The team arrived and Pepper, a dog specially trained to smell for drugs was led around Johnson's car. Pepper's reaction was positive for the presence of drugs inside the car.

Weaver then obtained a warrant to search Johnson's Cadillac. The police took the warrant to Johnson's room "as a courtesy" to Johnson, so he would know they were executing the warrant, and to allow him the opportunity to give them the car key in lieu of breaking the locks.

The police knocked on Johnson's motel room door which was ajar about one inch. The police identified themselves as such, but when Johnson saw who they were he attempted to close the door. The police forced the door to remain open, and asked Johnson to step into the hallway.

Johnson stepped into the hallway, and as he did he closed the door and it locked behind him. The police informed him of the warrant to search his car, and asked him if he would give them the key, and care to accompany them while they searched. Johnson said he would give them the key and go with them, but that since he was clad only in his underclothes and boots, he would first need to put on more clothes.

A passkey to the room was obtained and the door opened. Johnson re-entered his room and attempted once again to close the door. The police again forced the door to remain open for, as Weaver testified, "our own personal safety as well as his." Weaver and at least one other

officer stepped into the room. While Johnson proceeded to put on a pair of pants the police "looked around" and saw drug paraphernalia and white powder.

Everyone in the party then went to Johnson's car except one officer who was to guard against anyone entering or leaving the room. The Cadillac had been unlocked all this time. A search of the car proved Pepper's sense of smell to be less than reliable for no drugs or contraband of any kind were discovered.

The undaunted police then obtained a search warrant for Johnson's guarded motel room so they could search for what they had just discovered. This warrant led to Johnson's arrest and conviction for possession of cocaine and drug paraphernalia.

## III. THE MOTIONS TO SUPPRESS

Johnson made separate motions to suppress the evidence obtained at both motel rooms, and both motions were overruled. We agree with

Johnson that the evidence in both instances were obtained in violation of his rights under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, and we reverse his convictions.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). "[A] guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

The evidence seized at the Penny Pincher Motel should have been suppressed. The government unquestionably conducted a search of Johnson's room when one of the officers shone a flashlight's beam into his darkened room. The officer's testimony was clear that without the aid of the flashlight he could see nothing. The

government conducts a search when it uses enhanced viewing of the interior of a home, because it impairs a legitimate expectation of privacy. Dow Chemical Company v. United States, 749 F.2d 307 (6th Cir. 1984). A motel room is a person's "home away from home," and as observed in Stoner, supra, any search of one occupied by a guest encounters the Fourth Amendment warrant requirement, and, we add, the warrant requirement of Section 10 of Kentucky's Constitution.

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

There is no exception to be found here. Johnson did not consent to the search; on the contrary, his undivided attention was focused on the police officer questioning him while the other officer helped himself to the privacy of

Johnson's room. See Schneckloth v. Bustamounte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

This was not a search incident to a lawful arrest. Johnson was not arrested until after the flashlight search. See Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

No crime had been committed in the presence of the police, nor did they have any reasonable belief that the defendant had committed a felony. See Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974).

The officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. The goods they seized were not being destroyed or being removed from the jurisdiction. See Vale v. Louisiana, 399 U.S. 30 at 35.

The contents of Johnson's room were not in "plain view." The officer himself testified

that he could see nothing without using the flashlight. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)

Appellee cites Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), for the proposition that the use of a flashlight by a police officer to enhance his examination of items visible from the sidewalk is permissible. However, Brown dealt with an officer's shining his flashlight's beam into a parked car. We have heard for years from the government that one's expectation of privacy within one's automobile is less than that to be expected within one's residence. It necessarily follows then that one's expectation of privacy within one's residence is greater than within one's automobile. Additionally, the officer's flashlight in Brown enhanced the visibility of items; here, the flashlight made the invisible visible.

We do not subscribe to the government's belief that the officer's discovery of the contraband by shining his flashlight into the room is constitutionally excusable because of his testimony that he did so "for his own protection." There was no evidence that any other person was with Johnson. No noises emanated from within the room. Indeed, shining a flashlight into a darkened room in which one suspects a culprit may be laying in wait would seem to do more to provoke a confrontation than passively closing the door.

No "good faith" exception can be made here as announced in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The first search was patently illegal, and the officer's affidavit given to the magistrate to support the issuance of the warrant was clearly and materially misleading. He affied that he had seen "white powder and drug paraphernalia," but omitted any mention that he saw them only

because he searched a darkened room by illuminating it with a flashlight.

The evidence taken under the search warrant was clearly the fruit of the initial illegal search and seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The trial court should have suppressed this illegally obtained evidence under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.

We will not completely rehash our previous discussion of the general principles embodied by our federal and state constitutions, including their protection of citizens' privacy within motel rooms. We will rather begin our consideration of the Ramada Inn incidents by noting that the police literally forced their way into Johnson's motel room without a warrant. They had a warrant to search only Johnson's 1985 Cadillac.

The forced, warrantless entry into Johnson's Ramada Inn room constituted a search and seizure within the meaning of the Fourth Amendment. See Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

There is no exception to the warrant requirement to be found here anymore than one could be found under the scenario that transpired at the Penny Pincher Motel.

Johnson did not consent to the search; indeed, he tried twice to close the door to prevent the police officers' entry. It does not improve the government's position to quote the officer who testified that Johnson did not ask them to leave. The government has the burden of justifying a warrantless, forcible entry into a citizen's motel room. See McDonald v. United States, 333 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977). A lone citizen does not the bear the burden of disproving his final

acquiescence to the entry of his abode by a group of armed police officers, representative of the weighty authority of the government by the badges they wear.

The facts admit of no exception which would justify the government's unlawful behavior at the Ramada Inn. Their argument that they forced their way into Johnson's room out of concern for "our own personal safety as well as his own" holds water like a sieve. We are at a loss to understand how Johnson would have been endangered by putting on his pants in privacy. Moreover, if the officers were so concerned about their safety, in that Johnson could have procured a weapon while he put on his pants, why then, once they were inside the room, did they carelessly gawk around hither and yon as they did, instead of riveting their attention on Johnson? The police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and,

upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The "good faith" exception to the Fourth Amendment exclusionary rule for searches and seizures conducted pursuant to warrants does not apply here. The "good faith" exception falls by the wayside and suppression remains as a remedy if

> "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."

Leon, 468 U.S. 897 at 923.

The officer's affidavit in support of the warrant to search Johnson's room clearly and materially misled the magistrate. He affied that he could see the contraband from outside Johnson's room when in fact it did not become visible until after their forced entry. He also omitted the fact of the forced entry itself.

We close our opinion by recognizing and reaffirming the holding in Shanks v. Commonwealth, Ky., 504 S.W.2d 709, which is most appropriate here:

> Until the officers entered room 253, their testimony disclosed, they had observed nothing which justified Shanks' arrest. "Since it (the arrest) was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There having been no probable cause for arresting Shanks revealed by the adduced testimony, the items seized should not have been admitted into evidence . . . .
>
> The search and seizure cannot be validated under any of the carefully drawn exceptions to the constitutional requirement of a warrant.

Id. at 711.

The appealed convictions of Charles David Johnson were obtained by admission of illegally seized evidence. Inasmuch as we are reversing for the foregoing reason, it is unnecessary for us to consider Johnson's other claims of error.

EDITOR'S NOTE

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## QUESTIONS PRESENTED

I.

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE CASE WHERE THE KENTUCKY SUPREME COURT EXPRESSLY STATED THAT THE CASE WAS DECIDED UNDER THE KENTUCKY CONSTITUTION "[W]ITHOUT EXPRESSING ANY VIEW AS TO THE RESULT WHICH WOULD BE REACHED IN THIS CASE BY APPLICATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND APPLICABLE DECISIONS OF FEDERAL COURTS"?

II.

DID THE SUPREME COURT OF KENTUCKY CORRECTLY HOLD THAT IT IS UNCONSTITUTIONAL FOR THE POLICE TO MAKE A FORCED, WARRANTLESS ENTRY INTO A PERSON'S MOTEL ROOM ON THE ASSERTION THAT IT WAS FOR PERSONAL SAFETY, PARTICULARLY WHERE THE JUDGE WHO ISSUED A WARRANT FOR A CAR HAD REFUSED TO ISSUE A WARRANT FOR THE ROOM?

TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii-iv |
| REASONS WHY THE PETITION SHOULD BE DENIED | 1 |
| I. THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY | 1 |
| II. IF THE SUPREME COURT OF KENTUCKY HAD RELIED UPON THE FOURTH AMENDMENT, THE DECISION HOLDING THE SEARCH ILLEGAL STILL WOULD HAVE BEEN CORRECT | 3 |
| CONCLUSION | 10 |
| APPENDIX | |

TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) | 8 |
| Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564 (1965) | 2 |
| McDonald v. United States, 333 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948) | 8 |
| Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) | 2 |
| Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) | 6-7 |
| Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) | 8 |
| Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) | 7 |
| Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974) | 6 |
| Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1974) | 6 |
| Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) | 9 |
| United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982) | 6 |
| United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) | 6 |
| United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977) | 6, 8 |

United States v. Lyons,
706 F.2d 321 (D.C. App. 1983)..... 6

United States v. Segura,
663 F.2d 411 (2nd Cir. 1981)..... 8

United States v. Winsor,
846 F.2d 1569 (9th Cir. 1988)..... 7

Vale v. Louisiana,
399 U.S. 30, 90 S.Ct. 1969,
26 L.Ed.2d 409 (1970)..... 6, 8

NO. 89-1182

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

CHARLES DAVID JOHNSON — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Charles David Johnson, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Kentucky in this case. That opinion is reported as Commonwealth v. Johnson, -Ky., 777 S.W.2d 876 (1989).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I.

### THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY.

The petitioner seeks review of the decision of the Supreme Court of Kentucky. The decision of the Supreme Court of Kentucky was based exclusively on the state constitution. Indeed, the Supreme Court of Kentucky expressly stated that it

was not expressing any view on how the case would be decided under the United States Constitution and applicable decisions of Federal Courts:

> Without expressing any view as to the result which would be reached by application of the Fourth Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue, we affirm the Court of Appeals. A 5-6. Emphasis added.

Since the judgment of the Supreme Court of Kentucky was based exclusively on state law, this Court lacks jurisdiction to review the case. See Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 567 (1965) ("under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law"). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

II.

IF THE SUPREME COURT OF KENTUCKY HAD RELIED UPON THE FOURTH AMENDMENT, THE DECISION HOLDING THE SEARCH ILLEGAL STILL WOULD HAVE BEEN CORRECT.

As mentioned above, the Supreme Court of Kentucky did not decide this case under the United States Constitution. Rather, the Court expressly stated that it was deciding the case under the Kentucky Constitution. However, even if the Court had decided the case under the United States Constitution, the decision holding the search illegal still would have been correct.

At the outset, the Court should note that the police in the case at bar had sought a warrant for respondent's car and his motel room at the Ramada Inn. See Affidavit in Support of Search Warrant, A 16-17. However, the district judge specifically determined that the police did not have probable cause to search the room by issuing a warrant only for respondent's car. A 18.

Having been denied permission to enter respondent's room by the district judge who would only issue a search warrant for the car, the police decided they would force their way into the room on the claim that it was necessary for their personal safety. This forced, warrantless intrusion into respondent's motel room was patently illegal.

The evidence relevant to this issue includes the following:

Around 10:00 a.m. on September 17, Officer Ron Wietholter was at the Ramada Inn on personal business when he observed respondent acting suspiciously by moving objects around in his car. TE III, 201-203. Officer Wietholter notified Chief Weaver of this suspicious activity at 4:00 p.m. on September 17, 1985. TP Nov. 18, 3.

At 5:15 p.m. on September 17, Officer Eldridge of the Airport Police Department brought his dog trained in drug detection to the motel and they walked the dog around respondent's car in the rear parking area of the motel. TP Nov. 18, 3. The dog reacted in a positive manner for the presence of controlled substances. TP Nov. 18, 4.

The police then obtained a warrant to search respondent's car and was denied a warrant to search his room. TP Nov. 18, 4, A 18.

For the purpose of executing the warrant for the car, the police went to respondent's room to get a key and to determine if respondent wanted to accompany them on the search. TP Nov. 18, 5.

Respondent's door was open about an inch. TP Nov. 18, 6. The police knocked on the door and identified themselves as police officers. TP Nov. 18, 6.

When respondent saw who was outside his room, he attempted to close the door. TP Nov. 18, 6. The police prevented him from closing the door. TP Nov. 18, 6.

The police then had respondent step out into the hallway wearing only his underclothing and a pair of boots. TP Nov. 18, 6-7.

At this point, the police had not seen any contraband or controlled substances. TP Nov. 18, 7.

Respondent stepped out into the hall as instructed and closed the door behind him. TP Nov. 18, 7.

Respondent told the police he wanted to accompany them on the search of his car. TP Nov. 18, 7. A police officer then got a pass key so that respondent could get back in his room and get his clothing. TP Nov. 18, 8.

When respondent entered his room, he attempted to close the door. TP Nov. 18, 8. The police again kept him from closing the door "for our own personal safety." TP Nov. 18, 9-10.

Two to three police officers then went into respondent's room without respondent's permission to do so. TP Nov. 18, 9-10. Respondent then put his clothes on. TP Nov. 18, 10.

While in the room, the police observed drug paraphernalia and drug contraband. TP Nov. 18, 10. The police acknowledged that they could not have gotten a search warrant for the room without entering the room. TE II, 118.

After the police watched respondent dress, they went with him to the car. TP Nov. 18, 11. The car was searched but no contraband items were found in the car. TP Nov. 18, 12.

The police then obtained a search warrant for respondent's room based upon what they had seen while in the room. TP Nov. 18, 14-15.

The police had information that respondent carried firearms. TP Nov. 18, 15-16.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). A person has a legitimate expectation of privacy in a hotel room that he rents. In Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1974), the Supreme Court made it clear that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." See also United States v. Lyons, 706 F.2d 321, 326 (D.C. App. 1983); United States v. Killebrew, 560 F.2d 729, 733 (6th Cir. 1977); United States v. Bulman, 667 F.2d 1374, 1383-1384 (11th Cir. 1982); Shanks v. Commonwealth, Ky., 504 S.W.2d 709, 711 (1974).

The decisions of this Court make it clear that only in "a few specially established and well-delineated" situations may a warrantless search of a dwelling withstand constitutional scrutiny. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970). More recently, in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 1374-1375, 63 L.Ed.2d 639 (1980), the Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest and observed:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Id., 100 S.Ct. at 1382.

In the case at bar, the police literally forced their way into respondent's motel room. TP Nov. 18, 8, 9-10. The police did not have a warrant that authorized their entry into this room. On the contrary, the district judge had specifically determined the police did not have probable cause to search the room by issuing a search warrant for only Mr. Johnson's car even though the police asserted in their initial affidavit that they believed drugs were in both the room and car. See A 16; A 18.

The forced, warrantless entry into respondent's room clearly constituted a search and seizure within the meaning of the Fourth Amendment. See Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 3382, 3389, 82 L.Ed.2d 599 (1984). See also dissenting opinion at 104 S.Ct. 3394-3396.

In United States v. Winsor, 846 F.2d 1569, 1572-1573 (9th Cir. 1988), the Court addressed the question of "whether the police conducted a search within the purview of the Fourth Amendment when they looked into Winsor's room through the open door while standing in the corridor" after they had demanded that the door be opened. The Court held that "the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command." Id., p. 1573.

"It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amendment unless they fall within one of the few, well-delineated exceptions to the warrant requirement." United States v. Segura, 663 F.2d 411, 414 (2nd Cir. 1981), citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 2031-2032, 29 L.Ed.2d 564 (1971). The state has the burden of justifying the warrantless, forcible entry into respondent's motel room. United States v. Killebrew, supra; McDonald v. United States, 333 U.S. 451, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948). The fact is, however, there is no recognized exception to the warrant requirement that would justify the forced entry into respondent's motel room. "There is no suggestion that anyone consented to the search...The officers were not responding to an emergency...They were not in hot pursuit of a fleeing felon...The goods ultimately seized were not in the process of destruction... Nor were they about to be removed from the jurisdiction..." Vale v. Louisiana, supra, 90 S.Ct. at 1972.

The only justification that the police in the case at bar offered to their act of forcing their way into respondent's room and watching him dress was the assertion that it was done for their personal safety. TP Nov. 18, 8, 9-10. However, this Court has never given approval to police action of forcing their way into a person's home in this manner. Respondent certainly was no danger to the police while he was in his room and they

were on the outside. If respondent had come out of his room after dressing to accompany the police on the search of the car, the police could have protected themselves at that point by making the pat-down search for weapons authorized by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It was completely unnecessary and completely unreasonable for the police to force their way into respondent's room under the guise of protecting themselves.

In holding the search illegal, the Supreme Court of Kentucky aptly stated:

> [W]e have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to constantly observe him at a time when he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA 5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement. A 7-8.

Underscoring the previously mentioned fact that this case was decided under the Kentucky Constitution, the Supreme Court of Kentucky stated, "We are not willing, however, to recognize

exceptions [to the warrant requirement] so broad as to render meaningless the right secured by the Constitution of Kentucky." A 8.

The Supreme Court of Kentucky was certainly correct. The constitutional prohibition against unreasonable searches and seizures would be rendered meaningless if the police were authorized to force their way into people's homes without a warrant merely on the assertion that it was necessary for their personal safety. This case provides a glaring example of the dangers of allowing such police conduct. The police were told by a judge that they did not have cause to enter respondent's room. But the police did so anyway asserting that it was for their personal safety. There will be no check at all on the police if they are given a free hand to engage in such conduct.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. 89-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

V.

CHARLES DAVID JOHNSON, RESPONDENT

CERTIFICATE OF SERVICE

I, Rodney McDaniel, a member of the Bar of this Court, hereby certify that on this 14th day of February, 1990, the attached Brief in Opposition to Petition for Writ of Certiorari, Motion For Leave To Proceed in Forma Pauperis, Affidavit of Indigency, Notice of Appearance, Affidavit of Mailing and Appendix were mailed, first class postage prepaid, to Hon. Valerie L. Salven, Assistant Attorney General of Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, counsel for respondent. I further certify that all parties required to be served have been served.

Rodney McDaniel

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COUNSEL OF RECORD

NO. 89-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

V.

CHARLES DAVID JOHNSON, RESPONDENT

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

* * * * * * *

The Respondent, Charles David Johnson, asks leave to file the attached Brief In Opposition to Petition For a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

The Respondent was permitted to proceed as an indigent by the Supreme Court of Kentucky. The Respondent's affidavit in support of this motion is attached.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY — PETITIONER,

VS.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

CHARLES DAVID JOHNSON — RESPONDENT.

* * * * * * * * * *

I, Charles David Johnson, being first duly sworn, depose and say that I am the Respondent in the above-entitled case, and in support of my Motion to proceed without being required to pre-pay fees, costs, or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this proceeding are true.

1. Are you presently employed? NO

Ky STATE REFORMATORY 3120 PER MONT

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1981

$00.00 MONTH

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? NO

3. Do you own any cash or checking or savings accounts?

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

DAVID ANDREW JOHNSON SON

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

CHARLES DAVID JOHNSON

SUBSCRIBED AND SWORN to before me by Charles David Johnson on this 9 day of February, 1990.

NOTARY PUBLIC, STATE AT LARGE

My Commission expires: 3-24-91

APPEARANCE FORM

# SUPREME COURT OF THE UNITED STATES

No. 89-1182

Commonwealth of Kentucky (Petitioner or Appellant) *vs.* Charles David Johnson (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Charles David Johnson

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Rodney McDaniel

(Type or print) Name Rodney McDaniel

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Department of Public Advocacy

Address 1264 Louisville Road, Perimeter Park West

City & State Frankfort, Kentucky Zip 40601

Phone (502) 564-8006

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

NO. 89-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

V.

CHARLES DAVID JOHNSON, RESPONDENT

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 29.2

I Rodney McDaniel, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel of record for respondent in the above-styled action.

3. The attached Brief In Opposition to Petition for Writ of Certiorari, Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, Notice of Appearance, Certificate of Service and Appendix were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Joseph F. Spaniol, Jr., Office of the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

5. The mailing of the aforementioned documents took place on February 14, 1990, at approximately 4:00 p.m., which is within the permitted time set by Rule 15.2.

Rodney McDaniel

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COUNSEL OF RECORD

Subscribed and sworn to before me by Rodney McDaniel on this 14th day of February, 1990.

Madeline E. Jones

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: March 31, 1993

NO. 89-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF KENTUCKY, PETITIONER

V.

CHARLES DAVID JOHNSON, RESPONDENT

# APPENDIX

CONTENTS


| | PAGE |
|---|---|
| Opinion, Supreme Court of Kentucky Commonwealth v. Johnson, Ky., 777 S.W.2d 876 (1989)..... | 1-15 |
| Affidavit in Support of Search Warrant..... | 16-17 |
| Search Warrant..... | 18 |

TO BE PUBLISHED

# Supreme Court of Kentucky

No. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v. ON APPEAL FROM THE COURT OF APPEALS

CHARLES DAVID JOHNSON — APPELLEE

AND

CHARLES DAVID JOHNSON — CROSS-APPELLANT

v. ON CROSS APPEAL FROM THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY — CROSS-APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART AND REVERSING IN PART ON APPEAL

AFFIRMING ON CROSS APPEAL

The primary issue in this case is whether certain evidence used against appellant was lawfully obtained. On two separate occasions, three days apart, appellant was found to be in possession of illegal drugs, drug paraphernalia, and in the first instance, a handgun. The trial court overruled both of appellant's motions to suppress the evidence, but the Court of Appeals reversed holding that the police officer's act of shining a flashlight into a darkened hotel room, and their act of forcing their way into another hotel room, violated Section 10 of the

Kentucky Constitution and the Fourth Amendment to the Constitution of the United States. We granted the Commonwealth's motion for discretionary review to consider the issues it presented. We likewise granted appellant's cross-motion for discretionary review to consider his claims of trial error.

## I. Evidence Obtained at the Penny Pincher Motel

At approximately 6:00 a.m. on September 14, 1985, the Erlanger police were summoned to the motel in response to a complaint from a guest of a disturbance. The guest had reported that someone was beating on his door with a baseball bat. Upon the officers' arrival, appellant was found standing in an outside hallway between two motel rooms. One of the police officers knew appellant to be a drug user and perceived him to be under the influence of drugs at that time. During questioning, the police learned that appellant's room was number 165 and observed that the door was slightly ajar. While one officer talked with the appellant and asked for his identification, the other shined a flashlight through the partially open door into the darkened room. Just inside the door on a table top, the officer observed drug paraphernalia and a white powder substance. After this discovery, the officer noticed an opening in the window curtain. As he had done before and without entering the room, he shined his flashlight through the window and observed a handgun under the bed. Appellant was arrested, the police obtained a search warrant, and upon their search, cocaine, drug paraphernalia, and a handgun were found. Subsequently, appellant was convicted of

various drug possession offenses and possession of a handgun by a convicted felon.

Prior to trial, appellant moved the court to suppress the evidence. His motion was denied. On appeal, however, the Court of Appeals reversed. It held that the act of shining a flashlight beam into a darkened room amounted to a warrantless search in violation of appellant's constitutional rights.

At the outset we must determine whether the act complained of constitutes a search within contemplation of the Fourth Amendment and Section 10 of the Constitution of Kentucky. From the facts presented the police were entirely within their rights to go upon the motel premises and to the location where appellant was encountered. A disturbance had been reported to them and their assistance had been requested by the management of the motel. Upon seeing appellant in the hallway at or near the location of the reported disturbance and upon discerning that he appeared to be under the influence of drugs, their attention was naturally drawn to him, and by virtue of his whereabouts, to his room.

By design, rooms in modern motels are easily accessible and in close proximity to places of public passage. Many such rooms have picture windows with only a curtain to prevent public view. Without diminishing an individual's right to be protected from an unreasonable search of his motel room, Stoner v. California, 376 U.S.483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), we note that when one takes lodging in a motel it is with the certain knowledge that substantial numbers of persons unknown to him will be nearby and in a position to invade his privacy unless

caution is exercised to prevent it. As such, what would be sufficient vigilance to preserve one's privacy in a home, apartment or office may be insufficient in a motel room. This view was recognized in People v. Berutko, Ca., 453 P.2d 721 (1969), as follows:

> Essential to the determination of reasonableness in cases wherein officers obtain probable cause for arrest through their own observation is a consideration of the degree of privacy which a defendant may reasonably expect in a given enclosure accepted by him, whether or not that enclosure be his residence. (Emphasis added.)

In those instances when the police have a legitimate reason for their presence on the motel premises, we are without reluctance in holding that one who asserts that his rights have been violated by an unreasonable search accomplished by looking through a motel room window or door must show that he took precautions sufficient to create an objectively reasonable expectation of privacy. Otherwise, that which was seen was in plain view. Harris v. U.S., 390 U.S.234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

Having concluded that appellant's act of leaving his motel room door and window partially open to public view deprived him of a reasonable expectation of privacy, of what significance then is the police officer's use of a flashlight to look inside? In Texas v. Brown, 460 U.S.730, 103 S.Ct. 1535 75 L.Ed.2d 502 (1983), the Supreme Court broadly declared that "...the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment

protection." Likewise, in U.S. v. Richardson, 388 F.2d 842 (CA6 1968), the court held that use of ultra-violet light to determine if the defendant had touched a bank bag dusted with fluorescein powder was not a search within the fourth amendment. This court reached a similar result in Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971), but our holding was premised on the officer's legitimate concern for his safety as a reason for his use of a flashlight. We are now of the opinion that a determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day. One seeking to maintain his privacy should reasonably expect that persons disposed to look inside a motel room will not hesitate to enhance their visibility by use of a widely available device such as a flashlight. In Texas v. Brown, supra, in commenting upon the fact that the officer "bent down at an angle so [he] could see what was inside," the court said:

> The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.

In Coolidge v. New Hampshire, 403 U.S.443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in its plurality opinion the court set forth three requirements for a valid plain view seizure. These requirements are: prior justification for the officer's presence, inadvertence of discovery, and immediate apparentness that evidence has been found. Observation of these limitations provides sufficient protection for the public as guaranteed by

Section 10 of the Constitution of Kentucky and the Fourth Amendment to the Constitution of the United States. On this issue we reverse the Court of Appeals.

## II. Evidence Obtained at The Ramada Inn

On September 17, 1985, three days after appellant's arrest at the Penny Pincher Motel and following his release on bond, an off duty police officer observed appellant in the parking lot of the Ramada Inn. Upon probable cause, the sufficiency of which is not at issue here, the police obtained a warrant to search appellant's automobile.* Prior to commencement of the search, the officer went to appellant's motel room to inform him of the warrant and give him an opportunity to accompany them to the car and provide the keys.

Upon arrival at appellant's motel room, and consistent with what appears to be his normal practice, the police discovered the door standing slightly open. The officer knocked on the door and appellant, wearing only undershorts and a pair of boots, stepped out into the hallway. When informed of the search warrant for his car, appellant indicated he would provide a key and that he wanted to accompany the officers to observe the search. Attempting to re-enter his room to dress and obtain his keys, appellant discovered that he had locked himself

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*In addition to appellant's automobile, the police sought a warrant to search his motel room. The district judge to whom the affidavit was presented determined that probable cause was not shown for a search of the room and declined to issue the warrant.

out. As his attire was unsuitable for public activity and he did not have his keys on his person, one of the police officers offered to obtain a key from the motel office. Upon the officer's return with the passkey, appellant entered his room and attempted to slam the door behind him. One of the officers prevented the door from closing and the officers then forcibly entered the room. Once inside, the police discovered drugs and drug paraphernalia.

The Commonwealth argues that the police were entitled to force their way into the motel room to protect their personal safety. We are reminded that just three days earlier appellant had been found in possession of a handgun and the Commonwealth reiterates that appellant had stated he wished to accompany the police during the automobile search. On the theory that appellant would enter his room and return with a gun or other weapon, the Commonwealth argues that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), authorized the police to maintain observation of appellant while he was inside his room. As such observation could only be accomplished by entering the motel room, the Commonwealth argues, the police were within their rights to force their way inside.

We need not burden this opinion with a review of the various exceptions to the warrant requirement of the United States and Kentucky Constitutions. It is sufficient to say that we have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to

constantly observe him at a time at which he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement.

By the views expressed in this opinion, we do not denigrate the legitimacy of police officers' concern for their personal safety. We recognize, however, that preservation of constitutional rights frequently conflicts with an officer's perception of his need to protect himself. This court and other courts have willingly found exceptions to various constitutional provisions to better insure the safety of police officers. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 407, 9 L.Ed.2d 889 (1968); Pennsylvania v. Mimms, 434 US 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); Adams v. Williams, 407 US 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971); Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971). We are not willing, however, to recognize exceptions so broad as to render meaningless the right secured by the Constitution of Kentucky.

Without expressing any view as to the result which would be reached in this case by application of the Fourth

Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue we affirm the Court of Appeals.

### III. Issues on Cross-Appeal

Appellant first contends that the trial court erred to his prejudice by permitting a police officer to testify that when appellant's room was searched, the police wore rubber gloves because they had heard he "...might have AIDS or some other disease." In Wiggins v. Maryland, Md.Ct.App. 57 USLW 2539 (March 7, 1989)(No. 94-1988), the court noted that "...a climate of fear still surrounds the disease," and held

> it is not far-fetched that the jury, observing the (rubber) gloves, thought it better in any event, that the defendant be withdrawn from public circulation and confined in an institution with others of his ilk.

We agree with the Maryland Court that raising the specter of AIDS, without substantial relevance in bringing this to the attention of the jury, may result in unfair prejudice. In this case, however, the trial court's error in the admission of this evidence was harmless. RCr 9.24 Appellant was convicted of possession of cocaine, possession of drug paraphernalia, and possession of a handgun by a convicted felon. The evidence of his guilt was overwhelming and his substantial rights were not affected.

Finally, appellant's claim that he was prejudiced by evidence that his home had been searched by the police on an earlier occasion is without merit for two reasons. First, the absence of any carpentry tools at appellant's place of dwelling was relevant to rebut his testimony that he worked as a carpenter. Second, defense counsel raised an issue concerning police surveillance of appellant. The Commonwealth was thus entitled to explain that their surveillance resulted in the issuance of a search warrant. Moreover, the fact that no evidence of criminal activity was found at appellant's residence may have been to his advantage. Certainly, we are unprepared to say that he was prejudiced by this testimony.

## Conclusion

For the foregoing reasons and as set forth herein, upon the Commonwealth's appeal, we affirm in part and reverse in part; upon the cross appeal by appellant, we affirm. This cause is remanded to the trial court for further proceedings in conformity herewith.

As to Section I, all concur except Combs, J., not sitting. As to Section II, Lambert, Leibson and Vance, JJ., concur; Wintersheimer, J., dissents by separate opinion in which Stephens, C. J., and Gant, J., join; Combs, J., not sitting. On this issue the Court of Appeals is affirmed by an equally divided Court. As to Section III, all concur except Combs, J., not sitting.

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RENDERED: June 8, 1989
TO BE PUBLISHED

# Supreme Court of Kentucky

88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-748-MR
(Kenton Circuit Court #85-CR-195)

CHARLES DAVID JOHNSON — APPELLEE

AND

CHARLES DAVID JOHNSON — CROSS-APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-1305-MR
(Kenton Circuit Court #85-CR-195)

COMMONWEALTH OF KENTUCKY — CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which affirms the decision of the Court of Appeals in regard to the suppression of evidence obtained from a search of the Ramada Inn hotel room. The trial judge correctly overruled the defendant's motion to suppress evidence obtained in the search.

I specifically and strongly reject any implication from the majority opinion that this search was a pretext. The determination of whether a search is reasonable under the circumstances

is predominantly factual and should stay in the hands of the trial judge. A reviewing court should not substitute its findings for those of the trial judge. The trial judge is in the best position to ascertain the facts. Cf. CR 52.01.

When a reasonably prudent police officer believes that his safety or that of others is in danger, he may make reasonable search for weapons of a person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual. This is true even though the officer is not absolutely certain that the individual is armed, although he must secure a warrant when practical before making search or arrest. Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971). When such a search of a person that an officer believes is armed is confined to what is minimally necessary to determine whether the party is armed for the purposes of protecting the officer, the search is reasonable. Phillips, supra; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The real dangers with which police officers are confronted in their work on a daily basis cannot be ignored. Here the officers knew that a gun had been found in Johnson's motel room only three days earlier at the Pennypincher in Erlanger. The Fourth Amendment to the United States Constitution does not require a police officer who lacks the precise level of information necessary for probable cause to simply allow a crime to occur or a criminal to escape. Terry, supra, recognizes that an intermediate response may be

appropriate and that a brief stop of a suspicious individual in order to maintain the status quo momentarily while obtaining more information may be reasonable in the light of the facts known to the officers at the time. Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972).

Johnson was not a less dangerous suspect by the mere fact that he was not under arrest when the officers asked him for the keys to his car. Other state courts have found it reasonable to permit police officers to protect themselves while they are still investigating a possible crime. See Commonwealth v. Daniels, 280 Pa. 278, 421 A.2d 721 (1980); State v. Mayfield, 10 Kans.App. 2d 175, 694 P.2d 915 (1985). The reasoning of the Pennsylvania and Kansas courts was sensible and correct and properly persuasive when applied to the actions of the police in this case.

The United States Courts of Appeals have recently indicated that a protective search can be appropriate in certain circumstances. See United States v. Johnson, 637 F.2d 532 (8th cir. 1980); United States v. McClinnhan, 660 F.2d 500 (D.C. cir. 1982).

The United States Supreme Court has recognized that suspects may injure police and others by virtue of their access to weapons even though they may not be armed. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The U.S. Supreme Court determined that an interpretation of Terry, supra, need not restrict the preventative search to the person of the

detained subject. If a suspect is dangerous, he is no less dangerous simply because he is not arrested.

The United States Supreme Court has applied a common sense approach to this dangerous and delicate area of constitutional interpretation. A proper interpretation of Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police in exercising a protective search. The police entry into Johnson's Ramada Inn room was perfectly reasonable to assure that he did not emerge with gun in hand.

I would reverse the decision of the Court of Appeals and reinstate the judgment of the circuit court.

Stephens, C.J., and Gant, J., join in this dissent.

COMMONWEALTH OF KENTUCKY

COUNTY OF KENTON

FILED
KENTON CIRCUIT/DISTR
SEP 17 1985
ED SCHROEDER, CLERK
BY DC

APPLICATION AND AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT

Comes the Affiant, and states that the information contained herein was received and made in his capacity as a Peace Officer. Affiant's name is Chief Gene Weaver, Ft. Wright Police Dept. and Affiant believes there is

(on or in the premises numbered) (in the vehicle) (on the person of)

Charles Johnson — And A — 1985 Cadillac Eldorado
D.O.B. 8-17-38 — Ohio License 431-KBA
Room 329 Ramada Inn — Serial # or V.I.N #
Ft. Wright, Kentucky — 1G6EL5780FE663976

more particularly described as A Blue Cotton with a white Vinyl Top Cadillac bearing the above License Number and VIN Number presently located in the Ramada Inn Parking Lot. Said Room is located in the Ramada Inn, Ft Wright Kenton County, Kentucky.

the following property Cocaine and Drug paraphernalia, both of which are controlled under K.R.S. 218A.140.

which property affiant believes to be:

(~~stolen~~) (things used as the means of committing a crime) (things in the possession of a person who has intention to use as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered) (things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime) (contraband).

Affiant further states that on the date and at the time of

Sept. 17, 1985 at 4:00 ~~a.m.~~ (p.m.) affiant received information from/oberved: The Affiant is the Chief of Police of the Ft. Wright, Kenton County, Kentucky, Police Department. The Affiant received information from Officer Ron Weitholter that at approximately 11:30 A.m. on today's date he observed Charles Johnson in the lobby of the Ramada Inn.

A-16

[redacted] Officer Weithoter stated to the Affiant that Charles Johnson paced the lobby looking in all directions out the windows. Charles Johnson then left the lobby and approached the above described vehicle. Mr. Johnson then opened the trunk of the vehicle and listed the floormat up and then removed the side cardboard panel in the trunk compartment. Mr. Johnson then placed a [redacted] brown package in said compartment in manner which Officer Weithoter believes he was attempting to hide said package. Mr. Johnson then removed some clothing from the front of the vehicle and then placed them over the mat. The entire time [redacted] Mr. Johnson was constantly looking in all directions [redacted] in what appeared to be an effort to see if anyone was watching him. The Affiant Knows Charles Johnson and at present personally knows that Mr. Johnson has been Arrested in Carbondale, Ill. for possession of Cocaine and at present in the Mr. Johnson has [redacted] Three Trafficking in Cocaine charges, and in addition Mr. Johnson was arrested on 9-14-85 for Possession of Cocaine Mr. Johnson is a known drug user and trafficker in Cocaine. Thereafter the Affiant contacted Officer Doug Eldridge of the Greater Cincinnati International Airport Police Dept. in order that Officer Eldridge and his dog Pepper, which is trained [redacted] to detect marijuana, hash, heroine, and Cocaine and is certified by North American Police Workdog Association to detect said Drugs and was recertified on September 12, 1985 in order that they could make an external search of the above described cadillac. Officer Eldridge and Pepper [redacted] walked around the vehicle and when Pepper reached the trunk area of the vehicle Pepper made an indication that a controlled substance was present. Upon further detection Pepper further indicated that a controlled substance was located in the vehicle. Charles Johnson is registered in the above described room under the name of David Johnson. It is Affiants belief that there are controlled substances located in the above described vehicle and room in violation of K.R.S. 218A.140

Affiant believes his informant to be reliable and truthful because

Dave Weaver
AFFIANT

Subscribed and sworn to before me this 17 day of Sept, 1985, at 8:10 a.m. (p.m.)

W. Schmaedeke
JUDGE, Kenton Circuit Court

DEFENDANT'S EXHIBIT Bar

FILED
KENTON CIRCUIT/DISTRICT COURT
SEP 17 1985
ED SCHROEDER, CLERK
BY _____ DC

THE COMMONWEALTH OF KE[illegible]PANT

TO ANY POLICEMAN, SHERIFF, CONSTABLE, [illegible]e info[illegible]ER PEACE OFFICER OF THE COMMONWEALTH OF KENTUCKY:

Application, by affidavit, for a Search Warrant having been made this date, and it appearing that probable cause has been stated by the affiant, Chris Gene Weaver, H. Wright P.D., you are therefore commanded to search ~~(on or in the premises named)~~ (in the vehicle) ~~(on the person of)~~ A 1985 Cadillac Eldorado Ohio License - 431-KBA Serial # or VIN # 1G6EL5780FE663976 more particularly described as A blue bottom with a white Vinyl Top Cadillac bearing the Above License Numbers and Vin Number presently located in the Ramada Inn Parking Lot. for the following property Cocaine And Drug paraphernalia, both of which are Controlled under K.R.S. 218A.140. and to safely hold any thereof you may find until further order of a Court of Competent Jurisdiction, said property constituting evidence of an offense against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

Witness my hand this 17 day of Sept., 19 85

Executed this warrant this _____ day of _____, 19__, at _____ a.m./p.m.

W. Schmaedeke
JUDGE, Kenton Circuit Court
_____ Division